THE POWER OF THE FEDERAL GOVERNMENT TO EXTEND THE RECENT WAR ACTS OF CONGRESS INTO TIMES OF PEACE.*

TO GET a good perspective of the recent War Acts of Congress it is necessary to begin with the Federal Shipping Act, approved September 7, 1916,[1] under which the Emergency Fleet Corporation was organized, and the regular Appropriation Act for the Support of the Army, approved August 29, 1916, for the fiscal year ending June 30, 1917,[2] which authorized the President in time of war to take possession, and assume control and utilize systems of transportation. Under the former Act, the Federal Government undertook the manufacture and operation of ships of commerce as well as troop transport ships while the country was still at peace. And under the latter Act, the Federal Government on January 1, 1918, assumed the operation and complete control of all the railroads in the United States. But the nationalizing effect of the governmental assumption of the railroads was later much enhanced by the Act approved March 21, 1918,[3] which authorized the President, after having taken over control of the railroads, to turn all the earnings above "just compensation" for the use of the properties, into the Federal treasury. It would seem that this last act wiped out all similarity between the Federal control and a war receivership, and converted the government into a mere operating lessee, although of course the compulsory nature of the transaction precludes the existence of a basic contract, and yet it was in no sense an exercise of the power of eminent domain.

Another important act was that of June 12, 1917, authorizing the government to undertake the war risk insurance of vessels.[4]

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*The substance of the address of the President of the Alabama State Bar Association before the annual meeting of the Association in 1918.

[1] 39 Stat. L. 728, Comp. Stat. '16, § 8146a, *et seq.*

[2] 39 Stat. L. 645, Comp. Stat. '16, § 1974a.

[3] Comp. Stat. '18, § 3115¾a, *et seq.*

[4] 40 Stat L. 102, Comp. Stat. '18, § 514a, *et seq.*

Then comes the far reaching Act of August 10, 1917, called "An Act to provide further for the national security and defense by encouraging the production, conserving the supply and controlling the distribution of food products and fuel." [5] Its chief points are: (1) To authorize the President to condemn certain practices, profits and charges as unreasonable, and to say what would be reasonable; his finding to be *prima facie* evidence. (2) To fix the price of wheat on a basis of $2.00 a bushel for a certain grade, and to authorize the President to grade and price all other wheat with reference to that grade, guaranteeing to the producers that price. (3) To authorize the President to buy wheat and transport it, so as to maintain the guaranteed price; (4) To forbid the use of food products for distillation. (5) To authorize the President to fix the price of coal and coke anywhere in the country, and to establish rules of production, distribution and transportation; or if he thinks best, he may take over the production of coal, and work any mines and distribute the product; or he may require all producers in any area to sell their output to the government, the government undertaking to distribute it to the consumers.

A somewhat similar act is that of August 10, 1917,[6] authorizing the Secretary of Agriculture to buy seeds and sell them to the farmers at cost.

Another important act is what is known as the "Daylight Saving Law," approved March 19, 1918,[7] which enabled the President to direct the setting forward of all the time pieces in the country one hour from the last Sunday in March to the last Sunday in October in each year so long as the war lasts.

And perhaps the most far reaching act of all is that of April 5, 1918,[8] creating the "War Finance Corporation." This law makes the Secretary of the Treasury and four additional persons to be appointed by the President a body corporate to operate up to six months after the termination of the war with five hundred million dollars of capital, all of which shall be sub-

[5] 40 Stat. L. 276, Comp. Stat. '18, § 3115⅛a, *et seq.*
[6] Comp. Stat. '18, § 3115⅛a, *et seq.*
[7] Comp. Stat. '18, § 8907r, *et seq.*
[8] Comp. Stat. '18, § 3115 4/5a, *et seq.*

scribed by the United States, in advancing money to banks and trust companies who hold the notes of corporations or individuals engaged in conducting businesses necessary to the war, or, in exceptional cases, in lending money direct to the corporations and individuals themselves. The corporation may also advance money to savings banks when that is deemed helpful to "winning the war," and, of course, all the loans are to be appropriately secured.

I pass over the Draft Law of May 18, 1917,[9] the first and second Espionage Acts, of June 15, 1917,[10] and May 16, 1918,[11] respectively, the "Trading with the Enemy Act" of October 6, 1917,[12] and the "Soldiers' and Sailors' Civil Relief Act" of March 8, 1918;[13] because, while at one time in our constitutional history they might have been deemed of doubtful constitutionality, no unprejudiced lawyer considers the question even interestingly doubtful today.

And I close the list with the Act of May 16, 1918,[14] authorizing the taking by condemnation of buildings and land in the City of Washington in order to furnish residences for the families of war employees.

All these Acts are supposed to have been adopted under the so-called war powers of Congress; and indeed nearly all, if not all, of them except the act, under which the railroads were taken over by the government, stipulates that they shall pass off the statute books at the expiration of six months after the end of the present war. And Section 8 of Article I of the Constitution says that the Congress shall have power "to raise and support Armies," and "to provide and maintain a Navy," and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," of which, of course, Congress may be the reasonable judges. So there is no doubt but that the laws as worded are within the letter of the Constitution if the status of the country which they seek to bring about

[9] 40 Stat. L. 76, Comp. Stat. '18, § 2044a, *et seq.*
[10] 40 Stat. L. 217, Comp. Stat. '18, § 10212a, *et seq.*
[11] Comp. Stat. '18, § 10212c, *et seq.*
[12] 40 Stat. L. 411, Comp. Stat. '18, § 3115½a, *et seq.*
[13] Comp. Stat. '18, § 3078¼a, *et seq.*
[14] Comp. Stat. '18, § 3115 5/6a, *et seq.*

is necessary in order to win the war. And the German economic machine has about taught all of us to believe that the creation of such an economic machine in America was necessary to enable us to cope with the machine in Germany.

But can anyone who has followed the opinions of practical business men over the country believe that our machine can be stopped six months after the end of the war? Will the government be able to dispose absolutely of its millions of tons of shipping when the war is over? Or can any just basis be devised upon which the railroads now being operated without regard to ownership, can be turned back absolutely to the original owners, as of December 31, 1917? Or can the War Finance Corporation be so wound up when the war is over that the government will have no property interest in the various industries which it may see fit to found or support? Or will the people ever be willing to see withdrawn the strong arm of the government now prohibiting the producers and distributers of food and fuel from exacting from time to time unfair or unusual profits?

To all these questions I have found no one but answers, "No." So it is not only practical but exceedingly timely to consider how far the Federal Government can go, and whether these laws would be constitutional if the clause limiting them to six months after the termination of the war had been left off.

In the first place, war or no war, I have little doubt that every member of the Constitutional Convention of 1787, except possibly Hamilton, would have denied that the Federal Government could either own or operate all the State coaches in the country or fix the prices of wheat. Alexander H. Stephens recounts that when he first entered Congress, one day some member introduced a resolution that Congress cannot do indirectly what it cannot do directly, and every member present voted, "Aye," except John Quincy Adams, who had then returned from the Presidency to a seat in the House. Interested to know why such a sensible man took such a seemingly unreasonable position, Mr. Stephens went to Mr. Adams and asked him to explain his vote. "I voted no," quickly replied Mr. Adams, "because the proposition is untrue. For instance, Congress cannot raise the price

of beef. But Congress can declare war, and that will raise the price of beef."

And yet in 1917, Congress not only fixed the price of commodities, but in declaring war issued an interdict that war's normal effect should not produce the result which seventy-five years ago our leading statesman believed unescapable.

In addressing the American Bar Association in 1917, Mr. Charles E. Hughes brought his magnificent address on war powers to a close by saying, "It has been said that the Constitution marches, that is, there are constantly changing applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, the needed and adequate authority."

Ex-Justice Hughes spoke only of war powers. Let us think of powers inherent in the federated nation when emergency arises either in war or peace.

In 1888 Mr. James Bryce, in his criticism of the "American Commonwealth," as he called it, queried whether Congress could pass such a law as the Irish Land Act, which compels land owners in Ireland to accept graded rents under long term leases to their tenants. Mr. Bryce inclined to the view then generally accepted in America that "though the Constitution has imposed no prohibition on the federal Congress such as that which restricts a state, yet it does not seem to have conferred on Congress the right of legislating on such a matter at all."

But may that not be a question merely of the historic attitude of the people toward the Federal Government?

Let us recall that historic attitude. When the thirteen colonies were established, they were established as separate entities; and when they broke loose from the mother country they stood towards each other in the attitude of separate entities. Like a flock of chickens whose mother has been killed they rushed together instinctively; and when they congregated and formed a government for their immediate protection they naturally devised a government which recognized the former separate entities out of which it was constructed.

The great statesman who controlled the convention when the Constitution was drafted, realized that there could be no effec-

tive central government unless the government was given the power to operate upon the individual citizens like any other government, regardless of the existence of the several States; and yet the already existing organized separate governments were as so many facts which had to be recognized. And so our duplex government was devised—a central government to perform the functions of a nation so far as outside nations are concerned and so far as the interrelation of the citizens of the several States required the exercise of a superior government, and separate local governments to perform the functions of government inside the several States.

Analyze and classify the powers given to the Congress, as you will, from whatever angle, it is evident that the central government was given all the administrative powers ordinarily exercised in the Eighteenth Century by any government in Europe. The Congress shall have power: 1, to lay and collect taxes for the purpose of paying debts and of providing for the common defense and the general welfare of the nation; 2, to borrow money; 3, to regulate commerce with foreign Nations and among the several States; 4, to provide uniform naturalization and bankruptcy laws; 5, to provide a national money, and a national standard of weights and measures, and to punish for counterfeiting the currency; 6, to issue national patents and and copyrights; 7, to create national courts; 8, to declare war and raise and support armies; 9, to provide and maintain a navy; 10, to make all laws necessary and proper to put into effect the above and any other powers vested by the Constitution in the Government of the United States.

The Central Government was given elsewhere in the Constitution the power to make treaties with other governments and to appoint ambassadors, and to own and govern subject territory, which was later construed to authorize the acquisition of additional subject territory.

The several States were then deprived of all the important powers inhering in sovereignty—to make war, to negotiate treaties, to lay impediments upon free intercourse between each other, etc.

The Federal Government was also deprived of the right to do

certain things, which otherwise it might have attempted; but they all concerned the rights of the citizens rather than the rights of sovereignty, like the arbitrary suspension of the writ of habeas corpus and the power to make ex post facto laws.

Did any European government of the Eighteenth Century exercise any general external or internal powers which might not be classified under the powers given our Central Government?

Please understand that I am not presuming to assert that the framers of the Constitution intended to create an unlimited National Government. To take such a position without prolonged examination of all the speeches of all the members of the Convention and all the surviving letters and works of each of them of course would be both ridiculous and presumptuous. Indeed I frankly doubt whether any but Hamilton really desired it. My suggestion is that in creating a Central Government and giving it the named powers of sovereignty, they gave it all the powers which any nation needs to exercise internally or externally, except so far as they concern only some special locality and their effect may be confined to the territorial limits of the several States. The mere fact that the nation has not hitherto taken occasion to exercise its broad powers is beside the question. Suffice it to say that not until the last quarter of a century had it begun to be apparent that a large nation can better provide for the internal as well as the external relations of its citizens than can a small one. And, certainly, the facility with which the wording of clauses conferring the national powers is being stretched by the Supreme Court bears witness to the breadth of the Central Government which the bare language of the Constitution bestowed, without resorting to what we may call the inherent powers of government at all. Note the extension of the Federal powers under the interstate commerce clause ending in the Webb-Kenyon Liquor Act and the Mann White Slave Act; also the extension of the power to coin money clause in the National Bank Act and the Federal Reserve System.

Of course, there will always be many general subjects of legislation which could be appropriately treated either by the National Government or by the States, matters involving something more than local police powers and something less than the au-

thority of the Central Government. The Supreme Court of the United States is already beginning to prepare for such questions.

As we all know, it used to be held that the power to regulate interstate commerce was exclusively conferred upon Congress, and that the States could not legislate upon the subject at all, even though the special field under consideration might have been left untouched by Congress.

But, now that the commerce clause has been stretched to authorize interstate Federal police regulations, the theory of exclusive authority in Congress gave trouble. In the argument against the Webb-Kenyon Act,[15] "it was insisted that Congress had no power to delegate to the States the authority to regulate interstate commerce and thus subject such commerce to a control which, in the nature of things, would be lacking in uniformity. The Supreme Court answered that the argument as to delegation of power rested on a misconception; that, while the Webb-Kenyon Act permitted State prohibition to apply to the movement of liquor from one State to another, it was the will of Congress which caused the State prohibitions to apply and that their application to interstate commerce would cease the instant Congress so directed." [16]

It is evident that the second section of the Federal Prohibition Amendment which gives joint authority to the Federal Government and the States to enforce prohibition, is founded upon the decision of the Supreme Court on the Webb-Kenyon Act; [17] but how thoroughly it was worked out, or how it will be construed, I have not attempted to consider, although I am inclined to believe that the authority to enforce the amendment would have been exactly the same if Section 2 had been omitted.

But all these extending statutes and Supreme Court decisions at least show a change of the popular attitude from what it used to be toward the Federal Government. The war statutes are

[15] Act of March 1, 1913, 37 Stat. L. 699, Comp. Stat. '16, § 8739.

[16] Ex-Justice Hughes, in an address before the New York Bar Association on the extension of the interstate commerce clause.

[17] Clark Distilling Co. *v.* Western Md. Ry. Co., 242 U. S. 311. See discussion of this decision in 4 VA. LAW REV. 558.

merely developments of it, and show the desire for a strong centralized government when the need for it arises.

I need not confess that I have now little sympathy with the conception, which I had in my law school days, and which was taught me by my professors, that the language of constitutions must always be given the meaning intended by the drafters. It is true that such a rule of construction is logical; for if we are not guided by the meaning of the drafters in construing an enigmatical clause, what guide can we rely upon at all?

But we must remember that the language of the Twelve Tables of Rome was made the basis of legal fictions out of which grew a system of equity far in advance of the society of 450 B. C. when the Twelve Tables were first ordained. If fiction, interpretation and extension of meaning had not been resorted to, the system of law of the great Roman Empire would have been as hide binding as the system of law of the Empire of China has always remained. Or rather, there would have been no Roman Empire, no Roman civilization and probably no European civilization either, if the law of the Twelve Tables had remained as it was drawn.

The same thing may be said of most of the early written laws of England—the Statute de Finibus, the Statutes of Mortmain, the Statute of Fraudes; and the same thing may be said of the old common law causes of action.

Why then should written constitutions be treated in a different way?

Of course, the extension of the Constitution must be gradual. Nor can the intent of the framers be entirely disregarded. But the language is at most only an expression of the will of the people at the time; and if the language is still found to express the will of the people at a later time, even if it be a different will, why go through the form of changing the Constitution merely to ratify a different general intent?

But I am going too far into my personal opinions. In this paper I should go no further than to recall what the Congress has done, and to suggest what it meant. That much I hope these notes have accomplished.

And now for the lesson to us of the Bar. Of course I realize that few if any of us can have an opportunity to share with the Supreme Court of the United States the determination of the constitutionality of the recent Federal statutes. But we all have the opportunity all the time to influence public opinion. And public opinion will be crystallized into the men we send to Congress and the men we send to the State Legislatures; and these are going to be confronted with the problem of determining what shall be the structure of our State and Nation after the war.

We should not merely influence public opinion directly as individuals; but we should influence it indirectly as an organized Bar.

Let me impress upon you that only as a fully recognized Bar, in which all these questions are fully and carefully discussed and concluded upon, can we effectively influence public opinion to constructive good. We should begin in the local bar associations, and there thresh the questions out in detail. The meetings of the State Associations should present the opportunity to compare and select among the various conclusions reached in the meetings of the local associations. And the conclusions of the States Associations, after being studied by committees, should be worthy of being accepted as the basis of constructive work by the lawyers of the States.

The major part even of the educated lay members of the community probably never think on constitutional questions. Many of the members of the Legislature who are not lawyers, probably have never thought on constitutional questions until they are presented to them by lawyers in the Legislature. Sometimes even our public officers who are lawyers make unintentional blunders upon constitutional questions; and when those questions are important ones, it seems to me that the blunder may be traced back to neglect of duty by the organized Bar.

And now as to the other field for our work, the work of constructive legislation. There would seem to be no reason why the State Bar Associations should not have a directing hand in most of the substantive law legislation that is enacted. And as to the legislation affecting our courts, our court procedure, and

admission and expulsion from the Bar, all that should be prepared by us entirely. I do not mean that we have an exclusive right to do it; but that we should directly interest ourselves in doing it, and do it so carefully and well that the soundness of our work will be recognized and be adopted by the Legislature as their own.

We should be truly the third house of the Legislature, invited as worthy to share in the work of that body.

Then we will be something more than mere practicing lawyers; we will be something more than judges; we will be truly like that great patriarchal lawyer who has come down the stair of history as a law-giver. Let us exclaim in his words, "Lord, establish thou the work of our hands upon us. Yea the works of our hands, establish thou it."

Henry Upson Sims.

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